



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2010-279

v.

City of Hoboken (Hudson)
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the July 24, 2012 *Reconsideration* Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that because the Complainant has failed to establish in his motion for reconsideration of the Council’s February 28, 2012 Final Decision that 1) the GRC’s decision is based upon a “palpably incorrect or irrational basis” or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, and failed to submit any evidence to contradict the Custodian’s Statement of Information certification or Ms. Seguinot’s subsequent certification, said request for reconsideration is denied. Cummings v. Bahr, 295 N.J. Super. 374 (App. Div. 1996); D’Atria v. D’Atria, 242 N.J. Super. 392 (Ch. Div. 1990); In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 31st Day of July, 2012

Robin Berg Tabakin, Chair
Government Records Council



I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

Reconsideration
Supplemental Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting

Vesselin Dittrich¹
Complainant

GRC Complaint No. 2010-279

v.

City of Hoboken (Hudson)²
Custodian of Records

Records Relevant to Complaint:

August 13, 2010 OPRA request: Inspection of legal bills for legal services rendered in 2010.

August 26, 2010 OPRA request: Inspection of invoices for legal services rendered in 2010.

Request Made: August 13, 2010; August 26, 2010

Response Made: August 16, 2010; August 27, 2010

Custodian: Michael Mastropasqua

GRC Complaint Filed: October 25, 2010³

Background

February 28, 2012

Government Records Council's ("Council") Interim Order. At its February 28, 2012 public meeting, the Council considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. The Custodian's failure to immediately respond to the Complainant's OPRA requests granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

¹ No legal representation listed on record.

² Represented by Alysia M. Proko-Smickley, Esq. (Hoboken, NJ).

³ The GRC received the Denial of Access Complaint on said date.

See also Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).

2. The Custodian certified in the Statement of Information and Ms. Sequinot subsequently certified that all records responsive to the Complainant's two (2) OPRA requests were provided to the Complainant and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant's two (2) OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Although the Custodian's failure to respond to in writing to the Complainant's two (2) OPRA requests resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), the Custodian did not unlawfully deny access to the records responsive to the Complainant's two (2) OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), because both he and Ms. Sequinot certified that they provided all records responsive to the Complainant two (2) OPRA requests. Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Custodian's untimely responses do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

March 5, 2012

Council's Interim Order distributed to the parties.

March 22, 2012

Complainant's request for reconsideration attaching "HP Capshare Information Appliance" from Hewlett-Packard's ("HP") website. The Complainant requests that the Council reconsider its February 28, 2012 Final Decision based on a mistake.

The Complainant states that reconsideration is reserved for cases where "... (1) the decision is based upon a 'palpably incorrect or irrational basis;' or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g.*, Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401." In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003). The Complainant contends that it is obvious that the GRC did not consider, or failed to appreciate, the significance of probative, competent evidence. See Fusco v. Bd. Of Education of City of Newark, 349 N.J. Super. 455 (App. Div. 2002), *cert. denied* 174 N.J. 544 (2002).

The Complainant first contends that the GRC erred by failing to determine that the Custodian violated N.J.S.A. 47:1A-5.e. The Complainant asserts that the GRC's findings are contradictory to Ms. Anna Seguinot's ("Ms. Seguinot"), Clerk for the Law Department, legal certification. The Complainant asserts that although the Custodian certified in the Statement of Information ("SOI") that the Law Department responded to the Complainant's second (2nd) OPRA request verbally on August 27, 2010, Ms. Seguinot certified that "I called [the Complainant] on multiple occasions between August 30, 2010 and September 21, 2010." See Seguinot certification dated December 21, 2011 at pg. 1. The Complainant contends that Ms. Seguinot thus admitted to first contacting the Complainant on August 30, 2010 and not August 27, 2010, which represents the first (1st) day after receipt of said OPRA request. The Complainant contends that it is irrational for the GRC to conclude that Ms. Seguinot responded to the second (2nd) OPRA request on August 27, 2010 when she certified that she did not respond until August 30, 2010. The Complainant contends that this fact proves that the Custodian violated N.J.S.A. 47:1A-5.e pursuant to Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

The Complainant next contends that the GRC failed to consider and appreciate the fact that the Custodian could not have had to retrieve again the responsive records on August 27, 2010 if the very same records, as the Custodian asserted in the SOI, were already provided to the Complainant in response to his first (1st) OPRA request at the close of business on August 26, 2010. The Complainant states that the Custodian certified in the SOI that:

"... on August 27, 2010, Law Department staff again retrieved the responsive records, placed them on the table in the conference room and contacted the Complainant to advise that same were available. The Custodian certifies that the Law Department called the Complainant numerous times between August 30, 2010 and September 21, 2010 advising that the responsive records were ready for inspection." See Dittrich v. City of Hoboken (Hudson), GRC Complaint No. 2010-279 (Final Decision dated February 28, 2012) at pg. 4-5.

The Complainant contends that the Custodian's certification raises a pertinent question: if Ms. Seguinot did in fact retrieve and provide to the Complainant the records responsive to the Complainant's first (1st) OPRA request at 3:55 p.m. on August 26, 2010, then why did the Law Department need to retrieve those same records again on August 27, 2010? The Complainant contends that he inspected records on August 26, 2010 and submitted his second (2nd) OPRA request at that time for what the Custodian certified in the SOI were the same records, yet Ms. Seguinot had to again retrieve such records on August 27, 2010. The Complainant asserts that the only explanation is that Ms. Seguinot did not provide the bills/invoices responsive to his first (1st) OPRA request on August 26, 2010 and had to retrieve same for the Complainant's second (2nd) OPRA request on August 27, 2010. The Complainant asserts that this would also prove why Ms. Seguinot did not call the Complainant until August 30, 2010.

The Complainant further argues that the GRC erred by failing to appreciate the significance of the Custodian's refusal to provide a legal certification from Ms. Eileen Vesselin Dittrich v. City of Hoboken (Hudson), 2010-279 – Supplemental Findings and Recommendations of the Executive Director 3

Wehrhahn ('Ms. Wehrhahn'), Legal Assistant for the Law Department. The Complainant notes that Ms. Seguinot certified that "... [the Complainant] was denied access by ... [Ms. Wehrhahn] ..." Seguinot certification at pg. 2. The Complainant contends that Ms. Seguinot does not certify to her own involvement on September 22, 2010. The Complainant contends that his legal certification dated December 9, 2011 in which he recounted the events of September 22, 2010 remains undisputed.

The Complainant argues that it is undisputed that Ms. Wehrhahn was the actual person who denied the Complainant access to the records responsive to his second (2nd) OPRA request, yet the City did not submit a legal certification from Ms. Wehrhahn, which is contrary to the GRC's holding in Liebeskind v. Piscataway Township Police Department (Middlesex), GRC Complaint No. 2009-62 (Interim Order dated April 8, 2010). The Complainant states that in Liebeskind, the GRC ordered the complainant to submit a legal certification from a third party if the complainant intended to rely on the third party's statements. *Id.* at pg. 5. The Complainant contends that the same principles should apply here in order to achieve fairness between the parties: if the Custodian wants to rely on Ms. Wehrhahn's statements, then she should submit a legal certification.

The Complainant further argues that the GRC failed to consider and appreciate the fact that the Custodian violated his own well-established practice of allowing the Complainant to complete his inspection on September 22, 2010. The Complainant asserts that this practice was established on August 26, 2010 when Ms. Seguinot allowed the Complainant to inspect the records responsive to his first (1st) OPRA request until after 4:00 p.m. The Complainant asserts that the GRC should take judicial notice that once a "transaction" has started, it will not be interrupted just because business hours have ended. The Complainant asserts that in Renna v. County of Union, GRC Complaint No. 2004-136 (August 2005), the GRC held that "[t]here is nothing in OPRA which allows a Custodian's internal agency practice to inhibit a requestor's access to government records."⁴ The Complainant thus argues that Ms. Wehrhahn's interruption of the Complainant's inspection on September 22, 2010 was simply an excuse to deny access to the responsive records.

The Complainant next argues that the GRC failed to consider and appreciate the fact that it is impossible to scan 670 pages in 30 to 40 minutes. The Complainant states that the Custodian attached as part of the SOI 670 pages of records deemed to be responsive to both OPRA requests. The Complainant further states that the "Acknowledgment" form attached to his second (2nd) OPRA request states that "[a]ll documents satisfying the request were scanned by [the Complainant] using his personal scanning device." The Complainant states that Ms. Seguinot further certified that the Complainant's inspection took 30 to 45 minutes. Seguinot certification at pg. 1.

The Complainant contends that at issue is whether the Complainant could scan 670 pages in 45 minutes. The Complainant states that, pursuant to NJ Rule of Evidence 201, the GRC should take judicial notice of the attached screenshot from HP's website that highlights the specifications of his scanner. The Complainant states that the memory of the scanner is full after 50 pages and takes up to seven (7) minutes to upload to another

⁴ The GRC notes that it was unable to locate this quote in Renna.
Vesselin Dittrich v. City of Hoboken (Hudson), 2010-279 – Supplemental Findings and Recommendations of the Executive Director 4

storage device. The Complainant states that 670 pages would take 13 uploads which could take up to 91 minutes: twice the time of the 45 minutes that Ms. Seguinot certified it took for the inspection.

The Complainant argues that the only possible explanation is that the Complainant was provided with far fewer than 670 pages of records on August 26, 2010. The Complainant contends that despite numerous contradictions in the City's statements and legal certifications, the Custodian still claims that the responsive records were provided to the Complainant. The Complainant contends that the GRC failed to follow the Appellate Division's holding in Paff v. NJ Dept. of Labor, Bd. Of Review, 379 N.J. Super. 346 (App. Div. 2005), in which plaintiff filed an appeal of the GRC's final decision in Paff v. NJ Dept. of Labor, Bd. Of Review, GRC Complaint No. 2003-128 (October 2005)(dismissing the complaint based on the custodian's legal conclusion for denying access without any further review). The Complainant states that in Paff, the Court held that:

"OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records ... When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers." *Id.* at 354.

The Complainant contends that the GRC accepted the Custodian's allegations despite the glaring inconsistencies that existed in the evidence of record.

The Complainant argues that the GRC failed to consider and appreciate that the Custodian created additional barriers to access by forcing the Complainant to deal with two (2) employees in response to his second (2nd) OPRA request. The Complainant states that in Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (Interim Order dated April 25, 2007), the GRC held that:

"...requiring the Complainant to deliver the OPRA request to another department, at which time the Complainant was required to complete additional request forms for internal tracking, the Custodian placed an undue burden on the Complainant. The Construction Official has violated OPRA by requiring the Complainant to fill out an additional review request form." *Id.* at pg. 8.

The Complainant contends that the City placed a similar barrier to access on him here by forcing him to deal with both Ms. Seguinot, who was designated by the Custodian to handle these OPRA requests, and Ms. Wehrhahn, who was not. The Complainant further argues that the Custodian and Counsel never asserted that Ms. Wehrhahn was acting on behalf of the Custodian.

The Complainant contends that the facts in Dittrich are almost identical to the facts in this matter except that in Dittrich, the barrier to access was filling out additional forms. The Complainant asserts that the barrier to access herein was having to deal with an additional City employee and obtain additional permission to access the records even

though same were sitting directly in front of the Complainant. The Complainant contends that OPRA does not require a requestor to seek access from anyone but the Custodian; or in this case Ms. Seguinot who was designated by the Custodian to respond. The Complainant contends that Ms. Wehrhahn had no lawful purpose under OPRA to interfere in his inspection on September 22, 2010; thus, her actions were in violation of OPRA.

The Complainant also argues that the Law Department, as an internal agency, had no right to stop the Complainant's inspection because Ms. Seguinot, acting as the custodian, already provided the responsive records for inspection. The Complainant contends that in Wolosky v. Township of Jefferson (Morris), GRC Complaint No. 2010-163 (Interim Order dated June 28, 2010), the complainant argued that the Township created an additional barrier to access by withholding approved executive session minutes until the Council considered their disclosure at the next council meeting on July 14, 2010. The Complainant states that the GRC agreed with the complainant's argument and determined the denial of access was unlawful. The Complainant contends that the facts here are similar to those in Wolosky: Ms. Wehrhahn and the Law Department created an additional barrier to access by denying the Complainant inspection after Ms. Seguinot approved access and presented the Complainant with the records for inspection.

The Complainant further argues that the GRC failed to consider and appreciate that contested facts contained in the evidence of record warranted a referral to the Office of Administrative Law ("OAL"). The Complainant notes that he requested the GRC to take such an action in a letter to the GRC dated December 9, 2011. The Complainant states that in Edwards v. City of Plainfield Planning Board (Union), GRC Complaint No. 2010-17 (October 2011), the GRC referred the complaint to OAL for a hearing to resolve the contested facts because the complainant contended that the custodian failed to respond. *See also* DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-102 (Interim Order dated May 30, 2007), Andrews v. Township of Irvington (Essex), GRC Complaint No. 2008-243 (Interim Order dated September 30, 2009). The Complainant asserts that the GRC should have handled this complaint in accordance with past case law because of the glaring contradictions in the Custodian's submissions.

The Complainant argues that the GRC failed to consider and appreciate the ample evidence showing that the Custodian knowingly and willfully violated OPRA and unreasonably denied access to the responsive records in the totality of the circumstances. The Complainant states that certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The Complainant states that the following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their

wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

The Complainant states that in Z.T. v. Bernards Township Board of Education (Somerset), GRC Complaint No. 2007-277 (Interim Order December 18, 2008), the GRC referred the complaint to OAL for a hearing to resolve the facts. The Complainant states that the Administrative Law Judge (“ALJ”) ultimately determined that the custodian knowingly and willfully violated OPRA for failing to provide the responsive records and failing to offer a valid reason for not producing same. The Complainant states that the Custodian was thus ordered to pay the civil penalty for a knowing and willful violation pursuant to N.J.S.A. 47:1A-11.

The Complainant contends that had the GRC considered the evidence of record here as it did in Z.T., the GRC certainly would have referred this complaint to OAL for a hearing to resolve the facts. The Complainant contends that the Custodian knew he unlawfully denied access to records responsive to two (2) OPRA requests in a short period of time and thus attempted to conceal the City’s actions by obfuscating the facts. The Complainant contends that facts herein further indicate that the Custodian’s denial of access was intentional. *See United States v. Griffin*, 525 F.2d 710 (1st. Cir 1975), *cert. denied*, 424 U.S. 945 (1976).

The Complainant further contends that the circumstances surrounding this complaint evidence an intense personal animosity towards the Complainant from the Custodian’s Counsel. The Complainant asserts that he indicated this in his letter to the GRC dated December 9, 2011. The Complainant further asserts that the City’s hostility was further revealed in the SOI, where the Custodian stated “... knowing [the Complainant’s] litigious and hostile behavior toward the City...” and “... [the Complainant demanded to see the records.”

April 4, 2012

Letter from the Custodian’s Counsel to the GRC. Counsel states that the GRC forwarded its Final Decision to all parties, including the Complainant, on March 5, 2012. Counsel states that the City received the Complainant’s request for reconsideration on March 23, 2012. Counsel further states that pursuant to the GRC’s regulations at N.J.A.C. 5:105-2.10(b), a request for reconsideration must be filed within ten (10) business days following receipt of the decision. Counsel states that the Complainant did not submit his request for reconsideration until 14 business days after receipt of the Final Decision; thus, the request for reconsideration should be denied.

Counsel states that in the event that the GRC decides to accept the Complainant’s request for reconsideration, the City requests that the GRC consider said request in light of applicable case law, which states:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” [D’Atria]. Rather, reconsideration is reserved for those cases where (1) the decision is based upon a “palpably incorrect or irrational basis;” or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative,

competent evidence. *E.g.*, [Cummings]. The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. D'Atria, supra, 242 N.J. Super. at 401. 'Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.' *Ibid.*" Roundtree v. NJ Dept. of State, Div. of Elections, GRC Complaint No. 2011-305 (January 2012)(citing Comcast).

Counsel requests that the GRC require the Complainant, as the moving party, to "... initially demonstrate that the [GRC] acted in an arbitrary, capricious, or unreasonable manner, before the [GRC] should engage in the actual reconsideration process." Larsen v. Jablonski, Unpub. 2008 WL 4191022 (App. Div. 2008). Counsel states that the Complainant must also prove that either "(1) the decision is based upon a 'palpably incorrect or irrational basis;' or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence." Roundtree, supra (citing Cummings). Counsel states that it is the City's position that the Complainant cannot meet his burden. Counsel notes that the Courts have stated that "... motion practice must come to an end at some point and if repetitive bites at the apple are allowed, the core will swiftly sour," thus the GRC "must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration." D'Atria at 401.

Counsel objects to the Complainant's argument that the GRC failed to determine that the Custodian violated N.J.S.A. 47:1A-5.e. Counsel asserts that this argument demonstrates the Complainant's failure to understand the Council's Final Decision, which states that "[t]he Custodian's failure to immediately respond to the Complainant's OPRA requests ... results in a "deemed" denial ..." Counsel argues that the Complainant is thus requesting that the GRC revisit their analysis to come to the same conclusion.

Counsel also objects to the Complainant's argument that the GRC failed to consider the fact that the Custodian could not have retrieved on August 27, 2010 the same records that the Custodian certified were provided on August 26, 2010. Counsel contends that the Complainant attempted to parse the word "retrieve" in a manner similar to how he parsed the words "invoice" and "bill." Counsel asserts that the term "retrieve" does not necessarily mean to pull a record from a file. Counsel asserts that it could also mean to get records already pulled from a file off a desk or place they were safeguarded. Counsel contends that the Complainant provided no evidence to support his argument and offers no authority for the alleged arbitrariness, unreasonableness, or capriciousness of the Council's Final Decision.

Counsel asserts that the Complainant simply argues that under his definition of the word "retrieve," the certification and the GRC analysis are irreconcilable. Counsel asserts that the Complainant is attempting to confuse terms used by the City in order to maintain a litigious posture against the City.

Counsel objects to the Complainant's argument that Ms. Wehrhahn was required to submit a legal certification. Counsel asserts that the GRC never requested such a certification and there is no evidence in the record indicating that a legal certification was

necessary. Counsel asserts that the City did not need to rely on Ms. Wehrhahn's statements because Ms. Seguinot had first-hand knowledge of the actions of Ms. Wehrhahn. Counsel states that the GRC has discretion to determine whether additional information is necessary. *N.J.A.C. 5:105-2.3(k)* and *N.J.A.C. 5:105-2.4(l)*. Counsel contends that the weight of the credible evidence, including that the Complainant does not dispute the relevant actions taken by Ms. Wehrhahn, are in favor of the GRC's Final Decision.

Counsel objects to the Complainant's argument that the GRC failed to consider and appreciate that the Custodian violated his own well-established practice of allowing the Complainant to complete his inspection on September 22, 2010. Counsel notes that the Complainant provided no relevant case law supporting his argument. Counsel contends that the Complainant further requested that the GRC take judicial notice that a transaction cannot be interrupted simply because business hours ended, but provides no authority for this premise. Counsel asserts that the Complainant's only example is that he conducted previous reviews that were lengthy enough to go beyond the City's normal business hours.

Counsel states that OPRA provides that "[t]he custodian of a government record shall permit the record to be inspected, examined, and copied by any person *during regular business hours ...*" (Emphasis added.) N.J.S.A. 47:1A-5.a. Counsel contends that the City was well within its authority under OPRA to refuse the Complainant inspection of the responsive records when he appeared at the City offices five (5) minutes before the close of business hours. Counsel further contends that this issue has already been presented to the GRC, who performed a well-reasoned analysis, the Complainant presented no new evidence and no new law or precedent has been established.

Counsel further objects to the Complainant's argument that the GRC failed to appreciate that it is impossible to scan 670 pages of records in 30 to 45 minutes. Counsel contends that the GRC already analyzed this issue based on facts, evidence, legal certifications submitted previously in the record. Counsel asserts that it is further obvious that the Complainant was aware of the type of scanner he owned prior to his request for reconsideration and did not provide any evidence to the GRC prior to its Final Decision.

Counsel argues that the Complainant knows exactly what he was doing with his scanner equipment and the records provided on August 26, 2010; however, such facts are not probative. Counsel contends that the competent evidence demonstrates that the City provided the Complainant with the responsive records and there is no requirement that the City demonstrate exactly and precisely what the Complainant scanned and did not scan. Counsel further argues that there is no evidence in the Complainant's arguments that prove the City failed to comply with OPRA.

Counsel objects to the Complainant's final three (3) arguments. Counsel contends that these arguments offer no additional evidence; rather, the arguments rehash issues already addressed by the GRC. Counsel asserts that the Final Decision took into account all legal issues, all precedent, statutes and regulations and analyzed each issue based on the facts and found that this complaint was distinguishable from those complaints cited by the Complainant. Counsel argues that the Complainant's request for reconsideration is

an attempt to get another bite at the proverbial apple in hopes that he will prove some fault on the part of the City even though none exists.

April 21, 2012

Letter from the Complainant to the GRC with the following attachments:⁵

- “Acknowledgement” form dated August 26, 2010 with the Custodian’s notes thereon.
- Envelope postmarked March 8, 2012.

The Complainant states that although *N.J.A.C. 5:105-2.10* does not explicitly allow for replies to objections, the GRC’s regulations “...shall be liberally construed to permit the Council to discharge its statutory function.” *N.J.A.C. 5:105-1.2*. The Complainant further states that the purpose of the GRC’s regulations is “... for the benefit of any person seeking to utilize the Council ... and/or the functions of the Council.” *N.J.A.C. 5:105-1.1*.⁶ The Complainant asserts that he is the person seeking to utilize the Council; thus, the GRC’s regulations should be liberally construed to allow him to submit a reply so that the GRC may discharge its statutory function to properly adjudicate the instant complaint.

The Complainant states that the Custodian Counsel’s objection that the Complainant’s request for reconsideration was untimely because the GRC forwarded its Final Decision to all parties on March 5, 2012⁷ and the Complainant did not submit his request for reconsideration until March 23, 2012. The Complainant states that the attached envelope shows that the GRC did not mail the Final Decision until March 8, 2012. The Complainant further states that he received the Final Decision on March 9, 2012; thus, he filed his request for reconsideration on the tenth (10th) business day after receipt of the Final Decision. The Complainant further asserts that this filing is consistent with guidance received from the GRC on March 14, 2012, inasmuch as the GRC stated that *N.J.A.C. 5:105-2.10* provides that requests for reconsideration must be submitted within ten (10) business days following receipt of a decision.

The Complainant disputes Counsel’s objection that the Final Decision addresses the Custodian’s failure to immediately respond to his two (2) OPRA requests. The Complainant states that the Council’s held that the Custodian’s failure to immediately respond in writing resulted in a “deemed” denial. The Complainant further states that the Council noted that the Custodian verbally responded to his second (2nd) OPRA request on August 27, 2010. The Complainant asserts that he disputes this statement because Ms.

⁵ The Complainant also attached an e-mail from the GRC Mediator to the Complainant. Pursuant to the GRC regulations (*N.J.A.C. 5:105-2.5(j)*) and the Uniform Mediation Act (*N.J.S.A. 2A:23C-1 et seq.*), the GRC cannot consider any submissions of records or arguments made by either party during mediation.

⁶ The GRC notes that *N.J.A.C. 5:105-1.1*, provides that the GRC’s regulations “... establish procedures for the consideration of complaints ... and for the benefit of any person seeking to utilize the Council *as an information resource for understanding the Act and/or the functions of the Council.*” *Id.* The Complainant’s interpretation of this regulation is erroneous in that it does not expressly provide for additional submissions.

⁷ The GRC distributed its February 28, 2012 Final Decision to all parties via e-mail on March 5, 2012. The GRC further notes that the Complainant submitted his request for reconsideration via e-mail by replying to the GRC’s March 5, 2012 e-mail to him attaching the Council’s February 28, 2012 Final Decision.

Seguinot certified that she responded multiple times between “August 30, 2010 and September 21, 2010.” The Complainant argues that it is unreasonable to conclude that Ms. Seguinot responded on August 27, 2010 and that the Law Department immediately made the records available on the same date. The Complainant further contends that he emphasized this point in asserting that Ms. Seguinot could not have had to re-retrieve the responsive records on August 27, 2010 if the very same records were already provided to the Complainant on August 26, 2010. *See* Complainant’s request for reconsideration.

The Complainant disputes Counsel’s objection that “retrieve” does not always have the same meaning. The Complainant argues that the Council’s Final Decision notes that the Law Department retrieved the responsive records on August 27, 2010 and placed same on a table in the conference room. The Complainant argues that if the Custodian is arguing that the records were retrieved from the table where they were located on August 26, 2010 and placed back on the same table on August 27, 2010, then this argument is irrational. The Complainant reiterates that the only explanation is that the records initially provided in response to his first (1st) OPRA request were 31 summaries and that the Complainant finally retrieved the 670 pages actually responsive to both OPRA requests on August 27, 2010.

The Complainant further disputes Counsel’s objection that a legal certification from Ms. Wehrhahn was unnecessary. The Complainant asserts that Counsel provided Ms. Seguinot’s legal certification to the GRC without an order to do so, yet now argues that the City did not provide a certification for Ms. Wehrhahn because the GRC did not order same. The Complainant contends that it is undisputed that Ms. Wehrhahn was the person that denied access to the responsive records. The Complainant contends that the GRC acted arbitrarily and capriciously by simply accepting the Custodian’s allegations instead of following the Court’s direction in Paff v. NJ Dept. of Labor, Bd. Of Review, 379 N.J. Super. 346 (App. Div. 2005). The Complainant further argues that the GRC further acted arbitrarily and capriciously by accepting Ms. Seguinot’s legal certification because she granted access and by failing to address the City’s failure or refusal to submit a legal certification from Ms. Wehrhahn. The Complainant asserts that the GRC further failed to consider or appreciate the lack of probative evidence despite the Complainant’s request for such a certification.

The Complainant asserts that the GRC gave no weight to his statements and certification while placing all the weight on the Custodian’s certification and SOI. The Complainant argues that in doing so, the GRC acted in an arbitrary, capricious or unreasonable manner.

The Complainant disputes Counsel’s objection that the Complainant failed to provide case law or facts to support his request for reconsideration because it fails to acknowledge the very nature of judicial notice of “generalized knowledge,” “facts generally known” or “specific facts and propositions of generalized knowledge.” NJ Rule of Evidence 201. The Complainant contends that this type of judicial notice does not need to be supported by case law, although his arguments are supported by “the record of the court in which the action is pending.” *Id.* The Complainant asserts that Ms. Seguinot allowed the Complainant to inspect records on August 26, 2010 beyond the end of

business hours and there is nothing in her certification indicating that she needed permission from Ms. Wehrhahn to stay beyond 4:00 p.m.

The Complainant disputes Counsel's objection regarding the Complainant's handheld scanner. The Complainant asserts that it is a matter of "generalized knowledge" that handheld scanners have storage limits and vary in scanning speed, performance and other characteristics. The Complainant contends that such characteristics are "capable of immediate determination by resort to sources whose accuracy cannot reasonably be questioned." NJ Rule of Evidence 201. The Complainant asserts that here the source is the screenshot with the scanner's specifications attached to the Complainant's request for reconsideration. The Complainant further notes that NJ Rule of Evidence 202(b) provides that "[o]n appeal - The reviewing court in its discretion may take judicial notice of any matter specified in Rule 201, whether or not judicially noticed by the judge." *Id.* The Complainant thus contends that it is a matter of judicial notice that when his handheld scanner's memory is full (50 captured pages in memory), sending all the captured pages can take up to seven (7) minutes to upload to another storage device. The Complainant further reiterates his argument from the request for reconsideration that scanning 670 pages of records would have taken more than 90 minutes. The Complainant also asserts that it is a matter of judicial notice that it may take longer than two (2) seconds to scan a page even on stationary multifunction copiers.

The Complainant argues that a custodian of record has certain responsibilities, among them to make sure that records are not altered, damaged or stolen. The Complainant asserts that Ms. Seguinot supervised the Complainant as he scanned the provided records and wrote the statement "[a]ll documents satisfying the request were scanned by [the Complainant] using his personal scanning device" on an "Acknowledgement" form based on her personal observation. The Complainant contends that Ms. Seguinot did not specify the number of records the Complainant scanned. The Complainant asserts that Counsel thus subsequently tried to object to Ms. Seguinot's handwritten note on the "Acknowledgement" form by asserting in April 4, 2012 letter that "only the Complainant knows exactly what he was doing with his scanner equipment and the documents provided" and that "there is no requirement that the City demonstrate exactly and precisely what the Complainant was scanning or not scanning." The Complainant contends that these statements are false.

The Complainant asserts that as an evidentiary issue, the contemporaneous August 26, 2010 statement on the "Acknowledgement" form has more probative value than Counsel's objections. The Complainant states that in Ticey v. Peters, 8 F.3d 498 (7th Cir. 1993) the Court ruled that "... if a statement is proximate in time to the event, less opportunity for fabrication exists ..." and concluded that a statement made by a victim about the identity of her attacker was reliable, in part, because it was made within hours of the incident. Ticey, at 503. The Complainant further states that in Turbyfill v. International Harvester Co., 486 F.Supp. 232 (E.D. Mich. 1980), the Court similarly determined that a mechanic's handwritten statement about an accident the same day it occurred was admissible as evidence. *Id.* at 234. The Complainant asserts that the standard for disputing the Custodian's legal certification is set forth in Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-174 (September 2011) in that a complainant must submit evidence which "... rise[s] to the level of competent,

credible evidence sufficient to refute the Custodian's certifications" (Emphasis added.) *Id.* at pg. 8. The Complainant contends that the "Acknowledgement" form provides such competent, credible evidence because it provides Ms. Seguinot's statement immediately after the Complainant completed the review of the records on August 26, 2010. The Complainant asserts that Ms. Seguinot never changed, corrected, modified or revoked that statement in her subsequent certification, and neither had Counsel until her objections. The Complainant thus argues that Ms. Seguinot's statement on the "Acknowledgement" form has far more probative value and is far more competent evidence than Counsel's objection.

The Complainant further asserts that the chain of custody of the "Acknowledgement" form is well established. The Complainant asserts that the Custodian submitted the form to the GRC during mediation on May 3, 2010. The Complainant contends that if the Custodian used it to show disclosure of responsive records, the GRC should also consider it. The Complainant contends that the GRC accepted as truth all of the Custodian's statements and certifications; yet, did not even mention the "Acknowledgement" form anywhere in the Final Decision.⁸ The Complainant contends that the GRC's failure to address the "Acknowledgement" form is arbitrary, capricious and unreasonable because it is undisputed that the form constitutes probative, competent evidence. The Complainant asserts that if the GRC determined the "Acknowledgement" form was unreliable, then Ms. Seguinot's entire certification should be also rejected on the same ground that she is unreliable. The Complainant asserts that the form must be considered to show the impossibility of the Custodian's allegations that Complainant was provided with the responsive records consisting of 670 pages on August 26, 2010, and that Custodian denied access in violation of OPRA.

The Complainant also disputes Counsel's last objection because this objection does not address the remaining three arguments with any specificity, offering instead only generalities. The Complainant further argues that he did not reargue the same legal theories, as Counsel alleged, but rather relied on the decision in Dittrich and Wolosky, which hold that a custodian cannot create additional barriers to access. The Complainant thus contends that the remaining three arguments stand uncontroverted and factually unopposed by Counsel.

Analysis

Whether the Complainant has met the required standard for reconsideration of the Council's February 28, 2012 Final Decision?

Pursuant to *N.J.A.C. 5:105-2.10*, parties may file a request for a reconsideration of any decision rendered by the Council within ten (10) business days following receipt of a Council decision. Requests must be in writing, delivered to the Council and served on all parties. Parties must file any objection to the request for reconsideration within ten (10)

⁸ The GRC never received the "Acknowledgement" form as part of the evidence of record before mediation or after the complaint was referred back to the GRC from mediation. Thus, the GRC had no knowledge of the "Acknowledgement" form until the Complainant submitted same as part of this submission. *See* F.N. No. 5.

business days following receipt of the request. The Council will provide all parties with written notification of its determination regarding the request for reconsideration. *N.J.A.C. 5:105-2.10(a) – (e)*.

In the matter before the Council, the Complainant filed the request for reconsideration of the Council's Order dated February 28, 2012 on March 22, 2012, or 14 business days from the issuance of the Council's Order. The Custodian's Counsel submitted objections to the request for reconsideration on April 4, 2012 in which she argued that the GRC should deny the Complainant's request for reconsideration on the grounds that he failed to timely submit his request for reconsideration because the GRC forwarded to all parties the Council's Final Decision via e-mail on March 5, 2012.

The Complainant subsequently responded on April 21, 2012 stating that he did not receive the Council's Final Decision until March 9, 2012 via U.S. Mail. Thus, the Complainant timely filed his request for reconsideration.

Applicable case law holds that:

“[a] party should not seek reconsideration merely based upon dissatisfaction with a decision.” *D'Atria v. D'Atria*, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis;" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. *E.g., Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the court acted in an arbitrary, capricious or unreasonable manner. *D'Atria, supra*, 242 N.J. Super. at 401. ‘Although it is an overstatement to say that a decision is not arbitrary, capricious, or unreasonable whenever a court can review the reasons stated for the decision without a loud guffaw or involuntary gasp, it is not much of an overstatement.’ *Ibid.*” In The Matter Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

In support of his request for reconsideration, the Complainant first contended that the GRC failed to determine that the Custodian violated N.J.S.A. 47:1A-5.e. The Complainant contended that the Council determined that the Custodian initially responded to the Complainant's second (2nd) OPRA request on August 27, 2010 pursuant to the Custodian's SOI response; however, Ms. Seguinot certified that she responded by phone on multiple occasions between August 30, 2010 and September 21, 2010. The Complainant contended that it is irrational to conclude that Ms. Seguinot responded on August 27, 2010 if she herself certifies otherwise. The Complainant contended that this proves that the Custodian violated N.J.S.A. 47:1A-5.e.

The Custodian's Counsel objected to this portion of the request for reconsideration and argued that the Council's conclusion already includes this language.

Counsel further asserted that the Complainant essentially wants the GRC to revisit the issue and come to the same conclusion.

The GRC rejects this portion of the request for reconsideration. The Council's determination of this point is based on the Custodian's certification in the SOI that he initially responded on August 27, 2010, as noted in the Council's February 28, 2012 Final Decision. Moreover, a review of said Decision discloses that the Council made no determination regarding whether Ms. Seguinot properly responded in a timely manner nor did the Council include any discuss of this in its analysis. The Council did note that:

“[a]lthough the Complainant herein did not dispute the timeliness of the Custodian's response to his two (2) OPRA requests, the evidence of record indicates that a violation of OPRA has occurred. Specifically, no written responses from the Custodian to the Complainant were submitted to the GRC as part of either the Denial of Access Complaint or SOI.” *See Dittrich v. City of Hoboken (Hudson)*, GRC Complaint No. 2010-279 (Final Decision dated February 28, 2012).

Here, the Complainant failed to provide any competent, credible evidence that the Custodian did not call him on August 27, 2010.

The Complainant next contended that the GRC failed to appreciate that if Ms. Seguinot already provided the responsive records for the Complainant's review on August 26, 2010, she would not have had to retrieve the same records again to respond to his second (2nd) OPRA request. The Complainant contended that the only explanation for having to retrieve the records again was that Ms. Seguinot did not initially provide the Complainant with the records responsive to his first (1st) OPRA request and had to retrieve the actual records responsive for his second (2) OPRA request.

The Custodian's Counsel objected to this portion of the request for reconsideration, arguing that the Complainant attempted to parse the meaning of the word “retrieve,” similar to how he parsed the words “invoice” and “bill.”

The Council rejects this portion of the request for reconsideration. The Complainant's argument in this regard fails to constitute competent, credible evidence sufficient to affect the Council's Decision in this regard. Additionally, the Council notes that the Council has only the statutory authority to determine whether a custodian of record unlawfully denied access to government records. N.J.S.A. 47:1A-7.

The Complainant contended that the GRC failed to appreciate the Custodian's “refusal” to submit a legal certification from Ms. Wehrhahn. The Complainant asserts that Ms. Wehrhahn is the actual person that denied access him access to the responsive records. The Complainant contended that the GRC should follow its holding in Liebeskind v. Piscataway Township Police Department (Middlesex), GRC Complaint No. 2009-62 (Interim Order dated April 8, 2010) in which the GRC ordered the complainant to submit a legal certification from a third party if the complainant intended to rely on said statements.

The Custodian's Counsel objected to this portion of the request for reconsideration arguing that a legal certification from Ms. Wehrhahn was not necessary because Ms. Seguinot had first-hand knowledge of Ms. Wehrhahn's actions. Counsel noted that the GRC has discretion to determine whether additional information is necessary. *N.J.A.C. 5:105-2.3(k)* and *N.J.A.C. 5:105-2.4(l)*. Counsel contended that the weight of credible evidence in the record does not dispute any actions taken by Ms. Wehrhahn.

The GRC rejects this portion of the request for reconsideration. The evidence provided by the Custodian in the SOI and Ms. Seguinot's subsequent legal certification contained sufficient information for the Council to make a determination regarding this complaint, as is reflected in the Council's Final Decision dated February 28, 2012. Thus, the GRC need not request an additional certification from Ms. Wehrhahn.

The Complainant further contended that the GRC failed to appreciate the fact that the Custodian and Ms. Seguinot created additional barriers to access by (1) not allowing the Complainant inspect records beyond normal business hours even though she has done so in the past; and (2) forcing the Complainant to deal with two (2) employees in response to his second (2nd) OPRA request. Regarding normal business hours, the Complainant argued that the GRC should take judicial notice that once a transaction has started, it cannot be interrupted because business hours have ended. *Renna v. County of Union*, GRC Complaint No. 2004-136 (August 2005)(holding that an agency's internal policy cannot inhibit a requestor's access to government records).⁹ Regarding dealing with two (2) employees, the Complainant argued that the City set additional barriers by forcing the Complainant to gain additional permission to inspect records from Ms. Wehrhahn after Ms. Seguinot had already provided the responsive records for inspection. See *Dittrich v. City of Hoboken*, GRC Complaint No. 2006-145 (Interim Order dated April 25, 2007)(holding that requiring a complainant to deliver an OPRA request to another department and requiring him to fill out additional request forms placed an undue burden on the complainant) and *Wolosky v. Township of Jefferson (Morris)*, GRC Complaint No. 2010-163 (Interim Order dated June 28, 2010).

The Custodian's Counsel objected to these portions of the request for reconsideration arguing that the Complainant provided no relevant case law supporting these arguments. Counsel noted that OPRA requires a custodian to allow access to records during regular business hours. *N.J.S.A. 47:1A-5.a.* and argues that the City was well within its authority to refuse inspection when the Complainant arrived at the City five (5) minutes before the close of business.

The GRC rejects these portions of the request for reconsideration. Regarding the inspection after business hours, OPRA provides that "[t]he custodian ... shall permit the record to be inspected, examined, and copied by any person *during regular business hours* ..." (Emphasis added.) *N.J.S.A. 47:1A-5.a.* Although OPRA does allow for exceptions to this provision based on the size of public agencies, there is no exception requiring a custodian to allow inspection to continue after normal business hours. Additionally, the Complainant's citation *Renna* is inapposite to this case; *Renna*

⁹ See F.N. No. 4.

concerned an agency's internal policy aimed at inhibiting access to records. However, in the matter before the Council, OPRA simply does not require a custodian to keep the public agency open past the close of normal business hours to accommodate a requestor. Moreover, the fact that Ms. Seguinot previously allowed the Complainant to inspect records after business hours is not a universally acknowledged fact and is therefore not appropriate for judicial notice. *See N.J.A.C. 1:1-15.2(a) and (b), N.J.R.E. 201, Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App.Div. 1974).*

Regarding the Complainant's contention that dealing with two (2) employees created additional barriers to his access to the records sought, it is clear from the evidence of record that Ms. Wehrhahn stopped the Complainant's inspection of the requested records because the City was closing for business that day; as previously discussed, OPRA does not require a custodian to keep the public agency open past the close of normal business hours to accommodate a requestor. Moreover, the Complainant failed to submit any competent, credible evidence that would prove that dealing with both employees created an additional barrier to access. Additionally, the cases cited by the Complainant in support of this argument are inapposite to the facts of this case. The Council's holding in Dittrich, supra, is not applicable to this complaint because in the matter before the Council, the City did not require the Complainant to fill out several forms or hand-deliver his requests to other departments, as was the case in Dittrich. Moreover, the Council's holding in Wolosky, supra, pertains to the legality of a dual process of approval for meeting minutes. Again, the facts of that complaint are not similar to the instant complaint.

The Complainant contended that the GRC failed to appreciate the fact that it is impossible to scan 670 pages of records in 30 to 40 minutes with a personal scanner. The Complainant asserted that the GRC should take judicial notice of universally known facts from the screenshot from HP's website highlighting the specifications from the scanner he used to scan the records provided in response to his first (1st) OPRA request. The Complainant further argued that, contrary to the Appellate Division's holding in Paff v. NJ Dept. of Labor, Bd. Of Review, 379 N.J. Super. 346 (App. Div. 2005), the Council accepted the Custodian's allegations despite glaring inconsistencies in the evidence of record.

The Custodian's Counsel objected to this portion of the request for reconsideration arguing that the Complainant knew what type of scanner he had yet failed to provide any evidence regarding same to the GRC prior to the issuance of the Council's Final Decision. Counsel further argued that OPRA does not require that the Custodian prove exactly what the Complainant decided to scan and not scan. Counsel also asserted that there was no evidence in the Complainant's arguments to prove the City failed to comply with OPRA.

The GRC rejects this portion of the request for reconsideration. Specifically, the specifications of a device are not universally known and thus are inappropriate for judicial notice. *See N.J.A.C. 1:1-15.2(a) and (b), N.J.R.E. 201, Sanders v. Division of Motor Vehicles, 131 N.J. Super. 95 (App. Div. 1974).* Moreover, the Complainant knew about the specifications of his scanner before the issuance of the Council's Final Decision and failed to provide same to the GRC during the pendency of this case. In a request for

reconsideration, the party requesting reconsideration must bear the burden of proving with credible evidence that the GRC acted arbitrarily or capriciously: the Complainant failed to provide any evidence indicating that the records he scanned represented all the records provided.

The Complainant next contended that the GRC failed to consider and appreciate the Complainant's request to refer this complaint to the OAL. The Complainant asserted that the GRC previously referred other complaints with contested facts to the OAL. *See Edwards v. City of Plainfield Planning Board (Union)*, GRC Complaint No. 2010-17 (October 2011), *DeLuca v. Town of Guttenberg*, GRC Complaint No. 2006-102 (Interim Order dated May 30, 2007) and *Andrews v. Township of Irvington (Essex)*, GRC Complaint No. 2008-243 (Interim Order dated September 30, 2009).

The GRC rejects this portion of the request for reconsideration. In the three complaints cited by the Complainant, each contained contested issues of material facts, rendering such cases appropriate for adjudication by the OAL. *See N.J.S.A. 47:1A-7.e., N.J.A.C. 1:1-2.1.*

Here, the Council's Final Decision is supported by the evidence of record. Here, the GRC made a determination based on all of the submissions that is adequately supported by the evidence of record. Referral to the OAL for hearing was not appropriate in this matter. *N.J.A.C. 1:1-2.1.*

Finally, the Complainant contended that the GRC failed to consider or appreciate the fact that there is ample evidence supporting a conclusion that the Custodian knowingly and willfully violated OPRA. The Complainant asserted that in *Z.T. v. Bernards Township Board of Education (Somerset)*, GRC Complaint No. 2007-277 (Interim Order December 18, 2008), the GRC referred the complaint to the OAL for a fact-finding hearing in which the ALJ found that the custodian knowingly and willfully violated OPRA. The Complainant contended that had the GRC treated this complaint like *Z.T.*, it would have referred same to the OAL, and the OAL would have determined that the Custodian's actions were intentional.

The GRC rejects this portion of the request for reconsideration. There is no evidence in the record to support a conclusion that, under the totality of the circumstances, the Custodian knowingly and willfully denied access to the requested records. Specifically, the Complainant was provided with the records responsive to his first (1st) OPRA request. The Custodian, via Ms. Seguinot, made the same records available in response to the Complainant's second (2nd) OPRA request. The Custodian also attached copies of the records responsive to both OPRA requests to the SOI. Thus, the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA because the Custodian has provided the responsive records at least three (3) times before and during the pendency of the instant complaint.

As the moving party, the Complainant was required to establish either of the necessary criteria set forth above; namely 1) that the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence. *See Cummings, supra.* The Vesselin Dittrich v. City of Hoboken (Hudson), 2010-279 – Supplemental Findings and Recommendations of the Executive Director 18

Complainant failed to do so. The Complainant has also failed to show that the GRC acted arbitrarily, capriciously or unreasonably. *See D'Atria, supra*. Notably, the Complainant failed to submit any evidence to contradict the Custodian's SOI certification or Ms. Seguinot's subsequent legal certification. Further, the Complainant failed to present any evidence that was not available at the time of the Council's adjudication which would change the substance of the Council's decision.

Therefore, because the Complainant has failed to establish in his motion for reconsideration of the Council's February 28, 2012 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, and failed to submit any evidence to contradict the Custodian's SOI certification or Ms. Seguinot's subsequent legal certification, said request for reconsideration is denied. *Cummings, supra; D'Atria, supra; In The Matter Of Comcast, supra*.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that because the Complainant has failed to establish in his motion for reconsideration of the Council's February 28, 2012 Final Decision that 1) the GRC's decision is based upon a "palpably incorrect or irrational basis" or 2) it is obvious that the GRC did not consider the significance of probative, competent evidence, and has failed to show that the GRC acted arbitrarily, capriciously or unreasonably, and failed to submit any evidence to contradict the Custodian's Statement of Information certification or Ms. Seguinot's subsequent legal certification, said request for reconsideration is denied. *Cummings v. Bahr*, 295 N.J. Super. 374 (App. Div. 1996); *D'Atria v. D'Atria*, 242 N.J. Super. 392 (Ch. Div. 1990); *In The Matter Of The Petition Of Comcast Cablevision Of South Jersey, Inc. For A Renewal Certificate Of Approval To Continue To Construct, Operate And Maintain A Cable Television System In The City Of Atlantic City, County Of Atlantic, State Of New Jersey*, 2003 N.J. PUC LEXIS 438, 5-6 (N.J. PUC 2003).

Prepared By: Frank F. Caruso
Senior Case Manager

Approved By: Karyn Gordon, Esq.
Acting Executive Director

July 24, 2012



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Acting Commissioner

FINAL DECISION

February 28, 2012 Government Records Council Meeting

Vesselin Dittrich
Complainant

Complaint No. 2010-279

v.

City of Hoboken (Hudson)
Custodian of Record

At the February 28, 2012 public meeting, the Government Records Council (“Council”) considered the February 21, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote, adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to immediately respond to the Complainant’s OPRA requests granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).
2. The Custodian certified in the Statement of Information and Ms. Sequinot subsequently certified that all records responsive to the Complainant’s two (2) OPRA requests were provided to the Complainant and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant’s two (2) OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Although the Custodian’s failure to respond to in writing to the Complainant’s two (2) OPRA requests resulted in a “deemed” denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), the Custodian did not unlawfully deny access to the records responsive to the Complainant’s two (2) OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), because both he and Ms. Sequinot certified that they provided all records responsive to the Complainant two (2) OPRA requests. Additionally, the evidence of record does not indicate that the Custodian’s technical violation of OPRA



had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Custodian's untimely responses do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 28th Day of February, 2012

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Esq., Secretary
Government Records Council

Decision Distribution Date: March 5, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 28, 2012 Council Meeting**

**Vesselin Dittrich¹
Complainant**

GRC Complaint No. 2010-279

v.

**City of Hoboken (Hudson)²
Custodian of Records**

Records Relevant to Complaint:

August 13, 2010 OPRA request: Inspection of legal bills for legal services rendered in 2010.

August 26, 2010 OPRA request: Inspection of invoices for legal services rendered in 2010.

Request Made: August 13, 2010; August 26, 2010

Response Made: August 16, 2010; August 27, 2010

Custodian: Michael Mastropasqua

GRC Complaint Filed: October 25, 2010³

Background

August 13, 2010

Complainant's first (1st) Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

August 16, 2010

Custodian's response to the OPRA request. On behalf of the Custodian, Ms. Anna Seguinot ("Ms. Seguinot"), Clerk for the Law Department, responds verbally via telephone to the Complainant's OPRA request on the first (1st) business day following receipt of such request.⁴ Ms. Seguinot states that access to the requested records is granted and that same are ready for inspection.⁵

¹ No legal representation listed on record.

² Represented by Alysia M. Proko-Smickley, Esq. (Hoboken, NJ).

³ The GRC received the Denial of Access Complaint on said date.

⁴ The Custodian received the Complainant's OPRA request on Friday, August 13, 2010.

⁵ The Complainant inspected the records at the City of Hoboken Law Department on August 26, 2010.

August 26, 2010

Complainant's second (2nd) OPRA request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

August 27, 2010

Custodian's response to the OPRA request. On behalf of the Custodian, Ms. Seguinot responds verbally via telephone to the Complainant's OPRA request on the first (1st) business day following receipt of such request. Ms. Seguinot states that access to the requested records is granted and that same are ready for inspection.

October 25, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's first (1st) OPRA request dated August 13, 2010.
- Attorney bill summary for Ansell, Zaro, Grimm & Aaron dated June 25, 2010.
- Complainant's second (2nd) OPRA request dated August 26, 2010.

The Complainant states that he submitted an OPRA request on August 13, 2010 to the City of Hoboken ("City") seeking inspection of legal bills for 2010. The Complainant states that he previously inspected similar records without incident under the former Corporation Counsel.⁶ The Complainant states that the new Corporation Counsel, Mr. Michael Kates, Esq., apparently instituted a new policy. The Complainant states that on August 26, 2010, in response to the first OPRA request, Ms. Seguinot provided 31 summaries of bills for different attorneys or law firms instead of providing access to the actual bills.

The Complainant states that he advised Ms. Seguinot at that time that his OPRA request sought actual bills and not summaries. The Complainant states that Ms. Seguinot instructed him to file a new OPRA request for invoices and not bills. The Complainant asserts that the City's response was confusing because even the summaries referred to attorney bills and not invoices. The Complainant argues that he believes the City instituted a new policy to impede access to public records; nonetheless, the Complainant complied with the City's instructions and submitted a new OPRA request for invoices on August 26, 2010.

The Complainant states that Ms. Seguinot responded advising that compiling the records would take some time and that she would notify the Complainant when the records were available. The Complainant states that Ms. Seguinot called the Complainant on September 21, 2010 stating that the records were available for inspection. The Complainant states that Ms. Seguinot further advised that he had 24 hours to inspect the responsive records.

The Complainant states that he went to the City on September 22, 2010 to inspect the records. The Complainant states that as he was about to begin his inspection, Ms.

⁶ Former Corporation Counsel was Steven Kleinman, Esq. At the time that this complaint was filed, Corporation Counsel was Michael Kates, Esq. On November 29, 2010, the GRC received notification from the Custodian's Counsel that new and current Corporation Counsel is Mark A. Tabakin, Esq. *Vesselin Dittrich v. City of Hoboken (Hudson)*, 2010-279 – Findings and Recommendations of the Executive Director

Eileen Wehrhahn (“Ms. Wehrhahn”), Legal Assistant for the Law Department, came into the room and removed the binder with the responsive records. The Complainant asserts that he was confused because Ms. Seguinot had granted inspection of the records and now Ms. Wehrhahn was now denying same. The Complainant states that Ms. Seguinot advised him to return the following day. The Complainant states that accordingly, he returned to the City on September 23, 2010 at about 3:00 p.m. and was told by Ms. Seguinot that he should appear at an earlier time. The Complainant states that he returned to the City on September 24, 2010 at 12:00 p.m. at which time Ms. Wehrhahn again denied inspection of the responsive records and advised that Ms. Seguinot was out of the office. The Complainant states that at that point, he believed he had exhausted all available options and was compelled to file this complaint.

November 26, 2010

Offer of Mediation sent to both parties.

November 30, 2010

The Custodian agrees to mediate this complaint.

December 17, 2010

Telephone call from the Complainant to the GRC. The Complainant requests that the GRC re-send the mediation materials via e-mail.

December 17, 2010

E-mail from the GRC to the Complainant attaching the mediation materials. The GRC requests that the Complainant return the mediation agreement by close of business on December 22, 2010.

December 17, 2010

The Complainant agrees to mediate this complaint.

December 20, 2010

Complaint referred to mediation.

June 7, 2011

Complaint referred back from mediation.

June 28, 2011

Letter from the GRC to the Complainant. The GRC advises the Complainant that he has the opportunity to amend this Denial of Access Complaint prior to the GRC’s request for the Statement of Information (“SOI”) from the Custodian. The GRC states that the Complainant’s response is due by close of business on July 1, 2011.

July 11, 2011

Request for the SOI sent to the Custodian.

July 19, 2011

Custodian’s SOI with the following attachments:

- Complainant's first (1st) OPRA request dated August 13, 2010.
- Complainant's second (2nd) OPRA request dated August 26, 2010.
- Municipal Agencies General Records Retention Schedule M100000-008.
- Records responsive to the Complainant's two (2) OPRA requests (totaling approximately 670 pages).

The Custodian certifies that his search for the requested records included searching the appropriate filing cabinets in the City's Law Department. The Custodian certifies that the requested records are maintained by fiscal year and then alphabetically by the name of special counsel within each fiscal year. The Custodian certifies that the requested records were removed from cabinets and placed on a table in the Law Department conference room.

The Custodian also certifies that the last date upon which records responsive to the request may have been destroyed in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management was on June 1, 2011. The Custodian certifies that the records responsive to the Complainant's two (2) OPRA requests have been maintained in the Law Department to date and no records have been destroyed.

The Custodian certifies that he received the Complainant's first (1st) OPRA request seeking legal bills for 2010 at 3:10 p.m. on August 13, 2010, a Friday, and the Complainant was called on the morning of August 16, 2010, a Monday, advising that the responsive records were ready for inspection. The Custodian certifies that after the Complainant failed to appear to inspect the records, the Law Department called the Complainant on August 18, 2010, August 23, 2010 and August 24, 2010 to remind him that the records were ready for inspection. The Custodian certifies that because the Complainant did not return any calls or come to the City, Law Department staff re-filed the records on August 25, 2010.

The Custodian certifies that at 3:55 p.m. on August 26, 2010, the Complainant appeared at the City demanding to see the responsive records. The Custodian certifies that although regular business hours are 9:00 a.m. to 4:00 p.m., Law Department staff pulled the records for inspection. The Custodian certifies that the Complainant was provided with purchase orders, summary pages and detailed billing statements for each special counsel that filed billing statements with the Law Department for 2010. The Custodian certifies that after inspecting the records, the Complainant contended that the City had not complied with his OPRA request because same sought "invoices" and he was not provided with "invoices." The Custodian certifies that the Complainant was advised that all records responsive were provided. The Custodian certifies that the Complainant insisted that the City denied access to invoices because he had requested bills. The Custodian certifies that the Complainant was advised that he could submit another OPRA request seeking "invoices" in order to verify that all records responsive to his first (1st) OPRA request were provided by the City.

The Custodian certifies that the Complainant filed a second (2nd) OPRA request on August 26, 2010 seeking legal invoices for 2010. The Custodian certifies that on August 27, 2010, Law Department staff again retrieved the responsive records, placed

them on the table in the conference room and contacted the Complainant to advise that same were available. The Custodian certifies that the Law Department called the Complainant numerous times between August 30, 2010 and September 21, 2010 advising that the responsive records were ready for inspection. The Custodian certifies that after receiving no response from the Complainant, on September 21, 2010, the Complainant was informed that the responsive records would be re-filed if he did not appear within 24 hours to inspect same. The Custodian certifies that the Complainant was further advised that his OPRA request would be considered abandoned and that he would have to submit a new OPRA request to inspect the records. The Custodian certifies that the Law Department's position was based on the fact that keeping the records on the conference room table was extremely disruptive to department operations.

The Custodian certifies that the Complainant did not respond to the September 21, 2010 voicemail and instead came to the City on September 22, 2010 at 4:00 p.m., at which time he was denied access to inspect the records because it was past the City's normal business hours. The Custodian certifies that the Complainant was offered a chance to make an appointment and declined to do so. The Custodian certifies that legal assistants were subsequently asked to make copies of all the records and return the originals to the files to minimize the disruption caused by the documents sitting on the conference table. The Custodian certifies that the Complainant has not returned to the City since September 22, 2010 and the responsive records still remain on the conference table in the Law Department.

The Custodian asserts that in accordance with N.J.S.A. 47:1A-5.e. and N.J.S.A. 47:1A-5.g., the Complainant was provided with immediate access to the responsive records. The Custodian argues that the City continued to make the responsive records available for inspection and continuously reminded the Complainant of such. The Custodian further asserts that the Complainant was never denied access to the responsive records and that there was no actual denial under N.J.S.A. 47:1A-5.a. because the City never provided a written response denying access to the responsive records.

The Custodian argues that contrary to requests for copies of non-immediate access records, which require a written response, immediate access records must be disclosed immediately. The Custodian asserts that there is nothing in OPRA requiring a custodian to respond in writing providing access to immediate access records. The Custodian asserts that the Complainant came to the City on August 26, 2010, five minutes prior to the close of business and nine (9) business days after submission of the request to inspect immediate access records. The Custodian asserts that the Law Department remained after normal business hours to allow the Custodian to inspect the responsive records because of the Complainant's litigious and hostile behavior towards the City.

The Custodian states that pursuant to Weiner v. Newark Housing Authority (Essex), GRC Complaint No. 2010-121 (October 2010), the Custodian has not knowingly and willfully violated OPRA even if the GRC determines that a "deemed" denial has occurred. The Custodian further notes that OPRA provides for inspection of records during regular business hours. N.J.S.A. 47:1A-5.a. The Custodian argues that allowing the Complainant to review records after business hours displays a good faith effort to

accommodate the Complainant. The Custodian again certifies that the Complainant was provided with all records responsive to his first (1st) OPRA request.

The Custodian reiterates that the City received the Complainant's second (2nd) OPRA request on August 27, 2010 and immediately made the same records available to the Complainant. The Custodian contends that those records continue to be available for review and the City has not denied access to any records. The Custodian argues that to the extent that the Complainant seeks records other than those provided, the City asserts that the requests are unclear pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005) and New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007).

October 12, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that in preparing this complaint for adjudication, the GRC has found that the Custodian did not execute the SOI. The GRC states that Counsel advised in a brief telephone conversation earlier in the day that the City Clerk signed the SOI because the Custodian was on vacation.

The GRC states that in order for an SOI to be valid, same must be executed by the Custodian. The GRC thus requests that the Custodian review the SOI and execute same. The GRC requests that the Custodian return the signature page by close of business on October 14, 2011.

October 13, 2011

E-mail from the Custodian's Counsel to the GRC attaching the Custodian's executed SOI signature page.

December 9, 2011

Letter from the Complainant to the GRC with the following attachments:

- Complainant's legal certification.
- Thirty-one (31) attorney bill summaries.
- Legal bills for Florio & Kenny, LLP, for 2006 and 2007 (54 pages).
- Legal bills for Scarinci & Hollenbeck, LLC for 2006 and 2007 (54 pages).
- People for Open Government v. City of Hoboken, 397 N.J. Super. 502 (App. Div. 2008).

The Complainant states that pursuant to *N.J.A.C. 5:105-2.7(b)(1)*, he would like to respond to the Custodian's submission more than ten (10) days prior to the scheduled meeting of the Council on December 20, 2011.

The Complainant asserts that at least four (4) employees of the City were involved in responding to the Complainant's two (2) OPRA requests: the Custodian, Custodian's Counsel, Ms. Sequinot and Ms. Wehrhahn. The Complainant states that the SOI was written to be as vague as possible in order to conceal those individuals other than the Custodian and Counsel who worked on the OPRA request.

The Complainant argues that the Custodian's certification in the SOI is deficient because it is not based on personal knowledge; thus, the certification cannot constitute a sufficient factual basis for the finding. R. 1:4-4(a); R. 1:6-6; N.J.R.E. 602; In re Alleged Aggravated Sexual Assault of A.S., 366 N.J. Supper. 402, 411 (App. Div. 2004). The Complainant asserts that the Custodian did not have personal knowledge of what transpired at the Law Department because he was not present.

The Complainant argues that the GRC should have required Ms. Sequinot and Ms. Wehrhahn to sign certifications as they had personal knowledge of the events of this complaint. *See Halper v. Township of Piscataway*, GRC Complaint No. 2004-130 (December 2004) and *Mitzak v. Manalapan-Englishtown Regional Schools*, GRC Complaint No. 2005-205 (July 2006) The Complainant asserts that certifications from Ms. Sequinot and Ms. Wehrhahn will clarify the facts of this complaint.

The Complainant further states that the evidence of record shows that Counsel advised the GRC that the Custodian was away on vacation at the time of submission of the SOI, thus Mr. James Farina, City Clerk, signed the SOI. The Complainant asserts that it is obvious that Counsel prepared and tailored Item No. 8 of the SOI in the absence of the Custodian and to fit Counsel's legal argument.

The Complainant asserts that if the GRC does not order Ms. Sequinot and Ms. Wehrhahn to submit certifications, this complaint should be referred to the Office of Administrative Law ("OAL") for hearing as a contested case.

The Complainant argues that the City's motive for denying access to the responsive bills and invoices was that the citizen's action group, People for Open Government, of which the Complainant a member, sued the City in the past. *See People for Open Government v. City of Hoboken*, 397 N.J. Super. 502 (App. Div. 2008). The Complainant further asserts that he has also exposed the type of waste and corruption in the City that the "People for Open Government" looked to prevent in its lawsuit.

The Complainant disputes the Custodian's allegations that the Complainant was provided with bills but insisted on reviewing invoices. The Complainant further certifies that he knows that the words "bill" and "invoice" are used interchangeably.

The Complainant certifies that the Custodian falsely certified that the City provided bills in response to his August 13, 2010 OPRA request. The Complainant certifies that attached are the 31 summaries provided for inspection by Ms. Sequinot on August 26, 2010 that he scanned with his hand-held scanner. The Complainant certifies that he was provided with no additional records in response to either the August 13, 2010 or the August 26, 2010 OPRA request. The Complainant certifies that he was never provided with any bills or invoices.

The Complainant certifies that he previously requested bills following the conclusion of a complaint filed before the GRC⁷ in order to determine how much money the City spent on said complaint. The Complainant certifies that he attached the bills and summaries he reviewed in 2007. The Complainant certifies that he knew then that

⁷ Dittrich v. City of Hoboken, GRC Complaint No. 2006-145 (May 2007).

summaries would not provide enough detail for him to calculate the amount of money spent to defend the City in the complaint.

The Complainant further disputes the Custodian's argument that the Complainant only appeared at the City to review records on September 22, 2010. The Complainant certifies that he went to the Law Department on September 22, 2010 well before 4:00 p.m. with his hand held scanner. The Complainant certifies that his hand-held scanner quickly scans records thus it would take a short amount of time to review and scan the files. The Complainant certifies that on September 22, 2010, he was never allowed to begin his inspection. The Complainant certifies that Ms. Sequinot brought the records to him in a binder; however, Ms. Wehrhahn removed the binder and stated that the Complainant could not review the records.

The Complainant certifies that he returned to the Law Department around 3:00 p.m. on September 23, 2010. The Complainant certifies that Ms. Sequinot told him to come back on September 24, 2010. The Complainant certifies that he returned to the Law Department on September 24, 2010 at 12:00 p.m. The Complainant certifies that Ms. Wehrhahn told him that she would not provide access to the responsive records and that Ms. Sequinot was not in that day.

December 9, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests that the GRC advise whether the Complainant's December 9, 2011 submission is required for consideration. Counsel requests that if the submission is necessary for consideration, the GRC advise whether said communications will be considered in making a determination in this complaint. Counsel requests that if the GRC intends to consider said submission, the City be given reasonable time to review and respond to the submission prior to the GRC making any determinations.

December 9, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that its regulations at *N.J.A.C. 5:105-2* set forth the complaint process, including which submissions a party must provide. The GRC states that although *N.J.A.C. 5:105-2* does not expressly afford a response to the SOI and is silent as to whether any additional submissions are prohibited, as a matter of practice the GRC will, in its sole discretion, consider additional submissions which provide new information or evidence that was not available at the time of your first submission.

The GRC states that it is currently reviewing the Complainant's extensive submission and will inform Counsel if the GRC intends to consider same.

December 14, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC states that it has reviewed the Complainant's submission dated December 9, 2011 and intends to consider same. The GRC requests that Counsel provide the City's response by close of business on December 19, 2011.

December 14, 2011

E-mail from the Custodian's Counsel to the GRC. Counsel requests additional time to provide the City's response based on several labor intensive obligations due on December 19, 2011 and December 20, 2011.

December 14, 2011

E-mail from the GRC to the Custodian's Counsel. The GRC grants Counsel an extension of time until December 21, 2011 to submit the City's response.

December 21, 2011

Letter from the Custodian's Counsel to the GRC attaching Ms. Seguinot's legal certification. Counsel states that in an attempt to accommodate the Complainant's concerns expressed in his December 9, 2011 submission, attached is a legal certification executed by Ms. Seguinot. Counsel states that per Ms. Seguinot's certification, records were timely provided to the Complainant on two (2) occasions. Counsel further states that copies of all records provided in response to the Complainant's two (2) OPRA requests were attached to the SOI.

Counsel further disputes the Complainant's argument that the SOI is deficient. Counsel states that the GRC should be knowledgeable enough of its own forms to recognize that the Custodian's signature on the SOI certifies to only those five (5) statements included above the signature block. Counsel notes that none of the statements indicate that the entire response to Item No. 8 must be solely within the personal knowledge of the Custodian. Counsel argues that if this were true, the requirement that a custodian sign the SOI would be in conflict with the actual practice of other government employees handling OPRA requests. Counsel argues that the GRC's requirement that the Custodian execute the SOI even though he was not present during the preparation of same further conflicts the Complainant's argument. Counsel contends that the Complainant's arguments are thus inimical to the actual practice under which government agencies respond to OPRA requests. Counsel further argues that Ms. Seguinot's certification should render the Complainant's argument as moot.

Counsel further notes that the Complainant's argument regarding Ms. Seguinot and Ms. Wehrhahn fails to recognize that pursuant to Hoboken City Code Section 6-15.3, no employees of the Law Department are Deputy Custodians. Counsel states that Ms. Seguinot and Ms. Wehrhahn are thus not considered assistant custodians of record. Counsel asserts that the Custodian was not present during the Complainant's inspection sessions because the Complainant came to the City after normal business hours and refused to make an appointment or return calls to schedule same.

Counsel asserts that contrary to the Complainant's attempt to portray the City's actions as a bad faith effort to deny records, at no time did the City deny access to any records. Counsel states that the City made the responsive records available for inspection and requested clarification upon the Complainant's objection to the records provided. Counsel states that Complainant's second (2nd) OPRA request simply failed to identify any additional records that the City could provide to the Complainant. Counsel asserts that the Complainant further provided no evidence to indicate that the City failed to accommodate his OPRA requests adequately.

Ms. Seguinot certifies that on August 13, 2010, she retrieved the records responsive to the Complainant's first (1st) OPRA request and placed them in the Law Department conference room for inspection. Ms. Seguinot certifies that she called the Complainant on August 16, 2010 to inform him that the records were prepared for his inspection. Ms. Seguinot certifies that after the Complainant did not appear at the Law Department, she called and left messages for the Complainant on August 18, 2010, August 23, 2010 and August 24, 2010 advising that the records were prepared for inspection. Ms. Seguinot certifies that on August 25, 2010, after receiving no response from the Complainant, she filed the records in the appropriate locations because the statutorily mandated time frame to respond had expired.

Ms. Seguinot certifies that the Complainant came to the Law Department to review the records on August 26, 2010 at 3:55 p.m. Ms. Seguinot certifies that although the City's business hours are from 9:00 a.m. to 4:00 p.m., she agreed to retrieve the records for inspection. Ms. Seguinot certifies that at the conclusion of the inspection (approximately a half hour to forty-five minutes), the Complainant contended that she failed to provide him with the responsive records. Ms. Seguinot certifies that she explained to the Complainant that the records inspected represented all records responsive held at the Law Department. Ms. Seguinot certifies that the Complainant stated that he wanted to see legal invoices, at which point she explained that the records provided were invoices. Ms. Seguinot certifies that the Complainant was not satisfied with her response, thus, notwithstanding the fact that she had provided the Complainant with invoices, she advised him to submit another OPRA request seeking "legal invoices."

Ms. Seguinot certifies that the Complainant's second (2nd) OPRA request, date-stamped August 26, 2010, was brought to the Law Department. Ms. Seguinot certifies that she called the Complainant multiple times between August 30, 2010 and September 21, 2010 to advise that the responsive records were prepared for inspection. Ms. Seguinot certifies that once again, the Complainant failed to return any calls. Ms. Seguinot certifies that she called the Complainant on September 21, 2010 and advised that if he did not appear at the Law Department within 24 hours, the records would be returned to their files. Ms. Seguinot certifies that the Complainant did not return her call; rather, he appeared at the Law Department at 4:00 p.m. on September 22, 2010. Ms. Seguinot certifies that the Complainant was denied inspection by Ms. Wehrhahn as it was past normal business hours. Ms. Seguinot certifies that she asked the Complainant if he would like to schedule an appointment. Ms. Seguinot certifies that the Complainant declined to make an appointment and left the Law Department.

Ms. Seguinot certifies that she made copies of the records and left them in the Law Department conference room to ensure that same were prepared for inspection in the event that the Complainant returned. Ms. Seguinot certifies that to this day, the copies of the records are still in the conference room awaiting the Complainant's review.

Analysis

Whether the Custodian timely responded to the Complainant's OPRA request?

OPRA provides that:

“Immediate access ordinarily shall be granted to budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information.” (Emphasis added.) N.J.S.A. 47:1A-5.e.

OPRA also provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

Further, OPRA provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but not later than seven business days after receiving the request ... In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁸ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Although the Complainant herein did not dispute the timeliness of the Custodian's response to his two (2) OPRA requests, the evidence of record indicates that a violation of OPRA has occurred. Specifically, no written responses from the Custodian to the

⁸ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

Complainant were submitted to the GRC as part of either the Denial of Access Complaint or SOI.

Moreover, the Custodian certified in the SOI that the City responded verbally to the Complainant's August 13, 2010 and August 26, 2010 OPRA requests on August 16, 2010 and August 27, 2010, respectively, advising the Complainant that the responsive records were ready for inspection. The Custodian further certified that these responses were immediate since the City received both OPRA requests for bills and invoices late in the day on the prior business day. However, the Custodian argued in the SOI that OPRA does not require a written response for immediate access records.

It is clear that the responsive bills and invoices are specifically classified under OPRA as "immediate access" records pursuant to N.J.S.A. 47:1A-5.e. In Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007), the GRC held that "immediate access language of OPRA (N.J.S.A. 47:1A-5.e) suggest that the Custodian was still obligated to immediately notify the Complainant..." Inasmuch as OPRA requires a custodian to respond within a statutorily required time frame, when immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond or requesting clarification of the request.

OPRA requires a written response to an OPRA request. N.J.S.A. 47:1A-5.g. Although N.J.S.A. 47:1A-5.i speaks directly to the seven (7) business day time frame, the provision carries a caveat for "shorter time [periods] ... otherwise provided by statute ..." Additionally, the Legislature clearly intended that all OPRA requests be responded to in writing by providing that custodians "... shall indicate the specific basis [for a denial of access] on the request form and promptly return it to the requestor." N.J.S.A. 47:1A-5.g. Had the Legislature intended to allow custodians to simply grant access to immediate access records without providing a written response, it would have included such language within N.J.S.A. 47:1A-5.e. Moreover, N.J.S.A. 47:1A-5.g provides for no exceptions when responding to immediate access records.

When a Denial of Access Complaint is filed, a custodian of record bears the burden of proving a denial of access was lawful. N.J.S.A. 47:1A-6. As previously discussed, if a custodian fails to respond in writing within the statutorily mandated time frame, said failure results in a "deemed" denial of access. In complaints where it appears that a "deemed" denial may have occurred, the burden rests on the custodian to prove that he or she responded in writing in a timely manner. *See* Gonzales v. City of Gloucester (Camden), GRC Complaint No. 2008-255 (November 2009)(holding that the custodian failed to bear his burden of proof that he properly responded to the OPRA request.)

In Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011), the complainant requested, among other records, immediate access records. The GRC determined that immediate access records required an immediate response in writing:

"There is no evidence in the record to indicate that the original Custodian provided any written response to the Complainant's March 24, 2009

OPRA request for electric bills ... within the statutorily mandated time frame, which in this instance would be immediately upon receipt of the Complainant's OPRA request because the requested electric bills are immediate access records pursuant to N.J.S.A. 47:1A-5.e. As in Herron, supra, the original Custodian had a duty to respond immediately because the Complainant's OPRA request sought immediate access records, *i.e.*, bills, pursuant to N.J.S.A. 47:1A- 5.e." *Id.* at pg. 12-13.

The Council held that the Custodian's response "... [resulted] in a 'deemed' denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra, ... [and] violated N.J.S.A. 47:1A-5.e." *Id.* at pg. 13.

Thus, a custodian's response to an OPRA request for immediate access records must be in writing and made immediately upon receipt of said request in order to constitute a lawful response under OPRA. If a custodian fails to do so, said request is "deemed" denied. N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Campbell, supra.

The facts of this complaint are similar to the facts in Campbell, as the Custodian herein did not provide an immediate written response to the Complainant's two (2) OPRA requests for immediate access records.

Thus, the Custodian's failure to immediately respond in writing to the Complainant's OPRA requests granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, supra. See also Campbell, supra.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

"...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*" (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

"... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ..." (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In the Denial of Access Complaint, the Complainant argued that the City initially failed to provide inspection of the bills responsive to his first (1st) OPRA request. The Complainant asserted that when he disputed the records provided to him on the grounds that the records provided were not bills but summaries, Ms. Seguinot instructed him to file a second (2nd) OPRA request for invoices. The Complainant argued that he believed there was no difference between invoices and bills and that the City was attempting to block access; however, the Complainant submitted the second (2nd) OPRA request. The Complainant asserted that he subsequently went to the City on September 22, 2010, September 23, 2010 and September 24, 2010 to inspect the records responsive to his second (2nd) OPRA request and was denied access to the records requested on each occasion.

Conversely, the Custodian certified in the SOI that the Complainant inspected the records on August 26, 2010 and thereafter disputed that the records provided were summaries and not the requested bills. The Custodian certified that the Complainant was provided with all records responsive; however, the Complainant insisted that the City had not provided “invoices” because his first (1st) OPRA request sought “bills.” The Custodian certified that the Complainant was advised to submit a second (2nd) OPRA request for “invoices” in order to prove that all responsive records were provided in response to his first (1st) OPRA request. The Custodian certified that the Complainant submitted his second (2nd) request after normal business hours on August 26, 2010. The Custodian certified that the Law Department immediately made the requested records available on August 27, 2010; however, the Complainant did not appear at the City until September 22, 2010 at 4:00 p.m. The Custodian certified that at that time, the Complainant declined to make a future appointment and never returned to inspect the responsive records. The Custodian also provided to the Complainant copies of the responsive records as part of the SOI.

The Complainant submitted a letter and legal certification to the GRC on December 9, 2011 arguing that the Custodian’s SOI is deficient because he signed same without personal knowledge of the events of this complaint. The Complainant contended that the GRC should order Ms. Sequinot and Ms. Wehrhahn to submit legal certifications or refer the complaint to OAL for a fact-finding hearing. The Complainant further certified that he only received summaries in response to the first (1st) OPRA request. The Complainant further certified that he appeared at the Law Department on September 22, 2010, September 23, 2010 and September 24, 2010 but was unable to inspect the records responsive to his second (2nd) OPRA request.

On December 21, 2011, the Custodian's Counsel submitted Ms. Sequinot's legal certification in which she certified that the Complainant was granted inspection of all records responsive to his first (1st) OPRA request. Ms. Sequinot further certified that the Complainant only appeared on September 22, 2010 at 3:50 p.m. to review the records responsive to his second (2nd) OPRA request. Ms. Sequinot further certified that the Complainant never returned to review the records, so she made copies and refiled the originals. Ms. Sequinot finally certified that copies of all responsive records were still in the conference room at the Law Department awaiting review.

As previously stated above, when a Denial of Access Complaint is filed, a custodian bears the burden of proving a denial of access was lawful. N.J.S.A. 47:1A-6. See Rivera v. City of Plainfield Police Department (Union), GRC Complaint No. 2009-317 (May 2011)(holding that the custodian failed to provide any "... competent, credible evidence that the records requested ... were part of any ongoing investigation..." and thus failed to bear his burden of proving a lawful denial of access). Similarly, a complainant disputing a custodian's legal certification must provide competent, credible evidence to refute same. See Verry v. Borough of South Bound Brook (Somerset), GRC Complaint No. 2010-174 (September 2011)(holding that the complainant's legal certification did "... not rise to the level of competent, credible evidence sufficient to refute the [c]ustodian's certification..." thus the custodian did not unlawfully deny access to the requested records pursuant to Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005)).

The evidence of record here indicates that the City responded verbally to the Complainant on two (2) occasions providing access to the responsive records; however, the Complainant failed to show to inspect said records until nearly a month after each verbal response. Moreover, Ms. Sequinot's certification supports the legal certification and arguments presented in the SOI by the Custodian and Counsel respectively: the Complainant was provided access to all responsive records in response to his two (2) OPRA requests and only appeared to review same at the Law Department on August 26, 2010 and September 22, 2010.

Although the Complainant submitted a legal certification to the contrary attaching 31 summaries the Complainant certifies were the only records provided, the certification and evidence does not rise to the level of competent, credible evidence. Specifically, the Complainant certified that he used a hand-held scanner to scan the 31 summaries on August 26, 2010; however, this does not prove that these summaries were the only records provided. Further, the legal certifications of the Custodian and Ms. Sequinot carry more weight of competent, credible evidence.

Thus, the evidence of record indicates that the Complainant was provided with the opportunity to review all records responsive to both OPRA requests on August 16, 2010 and August 27, 2010. In Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), the custodian stated in the SOI that one (1) record responsive to the complainant's March 2, 2005, OPRA request was provided and that no other records responsive existed. The complainant contended that she believed more records responsive did, in fact, exist. The GRC requested that the custodian certify as to whether all records responsive had been provided to the complainant. The custodian subsequently certified

on August 1, 2005 that the record provided to the complainant was the only record responsive. The GRC held that:

“[t]he Custodian certified that the Complainant was in receipt of all contracts and agreements responsive to the request. The Custodian has met the burden of proving that all records in existence responsive to the request were provided to the Complainant. Therefore there was no unlawful denial of access.”

In this complaint, the Custodian certified in the SOI and Ms. Sequinot subsequently certified that all records responsive to the Complainant’s two (2) OPRA requests were provided to the Complainant and there is no credible evidence in the record to refute the Custodian’s certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant’s two (2) OPRA requests pursuant to Burns, *supra*.

Whether the Custodian’s untimely responses rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Felder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely

negligent, heedless or unintentional (ECES v. Salmon, 295 N.J. Super. 86, 107 (App. Div. 1996)).

Although the Custodian's failure to respond in writing to the Complainant's two (2) OPRA requests resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*, the Custodian did not unlawfully deny access to the records responsive to the Complainant's two (2) OPRA requests pursuant to Burns, *supra*, because both he and Ms. Sequinot certified that they provided all records responsive to the Complainant two (2) OPRA requests. Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Custodian's untimely responses do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to immediately respond to the Complainant's OPRA requests granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007). *See also* Campbell v. Township of Downe (Cumberland), GRC Complaint No. 2009-219 (Interim Order dated January 25, 2011).
2. The Custodian certified in the Statement of Information and Ms. Sequinot subsequently certified that all records responsive to the Complainant's two (2) OPRA requests were provided to the Complainant and there is no credible evidence in the record to refute the Custodian's certification. Therefore, the Custodian did not unlawfully deny access to the records responsive to the Complainant's two (2) OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005).
3. Although the Custodian's failure to respond in writing to the Complainant's two (2) OPRA requests resulted in a "deemed" denial pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007), the Custodian did not unlawfully deny access to the records responsive to the Complainant's two (2) OPRA requests pursuant to Burns v. Borough of Collingswood, GRC Complaint No. 2005-68 (September 2005), because both he and Ms. Sequinot certified that they provided all records responsive to the Complainant two (2) OPRA requests. Additionally, the evidence of record does not indicate that the Custodian's technical violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that Custodian's untimely responses do not rise to the level of a knowing and

willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

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Executive Director

February 21, 2012